IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.809 OF 2004

Shabbir Aihamat Jalil Aihamat Shaikh.)
R/o Rajguru Nagar, R/o 94/9-2,)
Bandra, Mumbai.)..Appellant.
At present at Thane Central Prison (Org.Accused No.3)

V/s.

1. The State of Maharashtra)
through Police Inspector)
Shri B.H.Patil, Palghar Police)
Station, Dist. Thane.)
)
2. Jan Mohamad Abdul Samad Shaikh,)
R/o Sangam Nagar, Zopadpatti,)
Wadala, Mumbai.)
)
3. Surajsingh Ramsingh)
Age 22. R/o Raju Nagar, Zopadpatti,)
Near Open Talkies, Bandra(E),)
Mumbai.)
)
4. Abdulakhalid Abdulahamid Shaikh)
R/o Acholeroad, Majethia Chawl,)
R/o 1, Nallasopara(E),)
)
5. Pralhad Motiram Gharat @ Pandit,)
R/o Marhim Chavre Chawl,)
Nallasopara(East).)
)..Respondents
6. Abhayraj Subhashchandra Shukla)(Res.No.1 org.
C/o Daulat, C/o Ibrahim Chavre Chawl,)complainant &
Nallasopara(West).)Res.Nos.2 to
)7 who were
7. Shabuddin Osabo Abdul Gafur Shaikh)orig.accused
Age: 20 years R/o Mumbai,)Nos.1, 2,4,5,6
Angam Nagar, Hosaya Majid,)& 7 are
Wadala, Mumbai.)deleted)

WITH

CRIMINAL APPEAL NO.638 OF 2004

1. Pralhad Motiram Gharat)
residing at Near Suryakant Thakur)
Chawl, Sutarpada, Boisar,)
District Thane.)
)
2. Abhayraj Subhashchandra Shukla)
@ Pandit, residing at)
Ibrahim Chaware Chawl, Near Nala)
Sopara Station, Nala Sopara(W))
(Both the Accused detained at)
Nasik Road Central Prison, Nashik)..Appellants.
(org.Accused Nos.5 & 6)

V/s.

State of Maharashtra)
(At the instance of Palghar Police)
Station))..Respondent.

Mr.D.A.Nalawade, for appellant in Appeal No.809/2004.

Mr.M.K.Kocharekar, for appellants in Appeal No.638/2004.

Mr.K.V.Saste, APP for Respondent-State.

CORAM: A.M.KHANWILKAR,J

DATE : DECEMBER 8, 2006.

JUDGMENT :

1. These appeals at the instance of accused No.3 and accused Nos. 5 and 6 respectively, are directed against Judgment and order passed by the First Adhoc Additional Sessions Judge, Palghar dated April 6, 2004 in the Sessions Case No.366 of 2001. Both these appeals are being disposed of by this common Judgment.

2. Briefly stated, the prosecution case is that the complainant-Ritesh Ramesh Shah(P.W.1) on 7.9.2001 at about 8.45 p.m. was walking across the railway crossing near Palghar railway station, followed by his father-Ramesh Chandmal Shah(P.W.7), maternal uncle-Champalal Umedmal Rathod(P.W.4) and Ramlal Parmar, servant of P.W.4. At that time, the accused persons came from behind and attacked P.W.4 with chopper blow and took away the bag containing the amount of Rs.14,290/- in the currency notes and gold zumka weighing 4 gms having plastic cover named in "Bhairav Jewellers" costing Rs.1800/-. It is stated that the P.W.4 raised shouts as "Pakado Pakado, Chor Chor". On hearing that cry P.W.1-complainant turned back and noticed that the accused persons were forcibly taking away the bag in possession of P.W.4 containing valuables. The accused persons also caused injury to Ramlal. It is stated that the accused persons were chased and one of them was accosted on the spot. The person who was accosted is said to be accused No.1. Within short time people gathered around and police also arrived. The suspect who was accosted while running away was handed over to the police. The complainant alongwith others then made arrangement to take away the injured persons to

the nearby hospital. It is not necessary to burden this Judgment with other details. It is stated that P.W.1 registered complaint, on the basis of which, investigation commenced.

3. In so far as accused No.3/appellant in the appeal No.809 of 2004 is concerned, the prosecution case is that he was accosted at Kelva Road Railway station and found in possession of cash which was part of the valuables contained in the bag snatched away from the P.W.4. The cash was seized under panchanama Exh. 46. Besides, the clothes worn by accused No.3 when accosted came to be seized in panchanama Exh.30. Blood stains were found on the said clothes. In so far as accused Nos. 5 and 6 are concerned no recovery of any incriminatory material is forthcoming. Be that as it may, the trial Court framed charges against the seven accused persons for offence punishable under section 395 r/w 397, 120(B) of I.P.Code. The accused pleaded not guilty and claimed to be tried. On analysing the oral as well as documentary evidence the trial Court proceeded to convict accused Nos. 1 to 6 for offence punishable under section 395 and 120(B) of I.P.Code and acquitted the accused No.7 of all the charges by the impugned Judgment and order.

4. In this appeal, the question which would arise for consideration for this Court is whether the finding of guilt against the accused Nos. 3 and Accused Nos. 5 and 6 as recorded by the lower Court can be sustained. For analysing this aspect, I would straightway advert to the substantive evidence produced by the prosecution. The prosecution would rely on the evidence of P.W.1, P.W.4 and P.W.7, who have spoken about the actual incident and involvement of the concerned accused.

5. In so far as P.W.1 is concerned, in his examination in chief he has deposed about the events as unfolded. He has said that on hearing the maternal uncle (P.W.4) shouting "Chor Chor", he turned back and saw four persons; he saw one of them snatching away the bag containing valuables from his maternal uncle(P.W.4). He has also deposed that these persons were holding choppers and that when his maternal uncle resisted to give the bag, he was attacked by chopper blow on his right hand. One of the accused hit chopper blow on the left cheek of his father(P.W.7) and one accused hit chopper blow on the right shoulder of Ramlal. Positive case of P.W.1 is that of four persons were engaged in the commission

of the offence. He has further deposed that after assault and snatching away of bag, those four persons ran away from platform No.1. Two persons, who were running with chopper in their hand, he succeeded in accosting one of them. Soon public gathered on the spot and police also arrived. Thereafter, he proceeded to provide medical assistance to his father. He has then deposed that he went to Palghar Police Station on 7/9/2001 at night, which is the date of incident and lodged complaint Exh. 27. He has then stated that after 10 to 15 days from the incident, he had gone to Mamaledar Kacheri for identification of the accused. He identified the four accused from 20 to 25 persons in the hall put for identification parade. From the test identification parade memorandum Exh. 68, it is seen that the P.W.1 had identified the accused Nos. 1 to 4 in the said parade. However, in Court the witness has identified the accused Nos. 1 to 3 and 6. He has identified accused No.6 under mistaken belief that the same person was identified by him during the test identification parade as accused No.4. This witness has been cross-examined. There is no attempt to contradict this witness with regard to the actual incident. However, the cross-examination is on the point that this witness could not have identified the

assailants as there was no visibility on the spot as it was night time and there was no electricity light around the spot. The spot in question was 100 mtrs. away from the railway platform at railway crossing. This witness has also been cross-examined on the point that his complaint was recorded at 12.00 mid-night when he had visited the police station. In the cross-examination, this witness is also challenged regarding the test identification parade and he having identified the accused persons. He has also been confronted during the cross-examination as to how he identified the accused No.6 in Court. He has admitted that he has not met accused earlier. Suggestion is given to him that he was deposing false at the instance of police, which has been denied by him.

6. The next witness, who has spoken about the actual incident is P.W.4-Champalal Rathod, maternal uncle of P.W.1-complainant. He has broadly corroborated the events spoken by P.W.1 regarding actual incident. He however, has given different number of the assailants. According to him, only 2-3 persons came from behind. He has then deposed that one month after the incident he was called at the Tahsil office, where he identified one suspect. From

the memorandum Exh. 68 it is noticed that he had identified the accused No.2. However, he identified accused No.5 in the Court and claimed that he had identified that person during the identification parade. This witness has been cross-examined on material aspects and in particular by the accused No.5 as to the basis on which he claimed that he had identified that accused at the test identification parade in Tahsil office. This witness has admitted that he was not in a position to say whether the accused No.5 was paraded for identification parade. It is relevant to note at this stage that the test identification parade is conducted only in respect of accused Nos. 1 to 4 as noted in Exh. 68 memorandum. This witness also admits that he was not in a position to say whether he had given description and appearance of accused No.5 to the police, when they recorded his statement. It was suggested to this witness that he was deposing falsely of having identified accused No.5 at the instance of the police, which suggestion has been denied by him.

7. The next witness relied by the prosecution with regard to the incident is P.W.7- father of P.W.1 complainant. Besides this witness, even Ramlal was present and in fact had suffered at the hands of the

assailants. However, Ramlal has not been examined by the prosecution. Be that as it may, so far as P.W.7 is concerned, this witness although corroborates the version of P.W.1 and P.W.4 about the incident, has stated that four persons were engaged in the commission of the offence. To put it differently, the evidence of three material witnesses in no way discloses that more than five persons were engaged in the commission of the offence. At the highest, it is stated that four persons were engaged, as spoken by P.W.1 and P.W.7. This witness(P.W.7) has additionally given the description of clothes worn by the persons at the time of incident. One of them was having dark blue colour white sported and other having light gray shirt. The person in light gray colour shirt according to this witness was accosted on the spot, who happens to be accused No.1. Interestingly, this witness has deposed that on the next day of the incident he was called to the Mamaledar office for identification, when he identified four suspects. He has identified those four persons in Court as well. Even this witness has been cross-examined on the material aspect and particularly, to doubt the veracity of his stand that he had opportunity to see the assailants. He has admitted in his cross-examination that there was no

electricity light on the spot at the time of incident. Besides, cross examination was on the point that he had weak eye sight and could not have identified the person. This witness has admitted that he had visited the Mamaledar's office for identification of suspects on 8th September 2001 and did not visit police station or the Mamaledar kacheri after 8th September, 2006. Whereas, test identification parade in Mamaledar office was held on 12th October, 2001, as noted in Exh. 68 as well as in evidence of P.W.13. In the cross-examination, attempt was made to elicit from this witness that there was possibility of suspects being seen before put up for test identification parade. It was suggested to this witness that he was deposing falsely at the instance of the police, which has been denied.

8. This is the substantive evidence with regard to the incident in question. The question is: whether it is possible to affirm the finding of guilt recorded by the lower Court in so far as accused No.3 and accused Nos. 5 and 6. In so far as accused No.3 is concerned, essentially three incriminatory circumstances are pressed into service by the prosecution. Firstly, that he has been identified by

the prosecution witness during the test identification parade as well as in the court, as one of the person engaged in the commission of the offence. The second incriminatory circumstance is recovery of cash amount from this witness, when he was accosted at Kelva Road railway station and which has been seized under panchanama Exh. 46 on the same night. Third incriminatory circumstance is recovery of blood stained clothes from the person of accused No.3 under panchanama Exh. 30.

9. In so far as accused Nos.5 and 6 are concerned, it is not in dispute that they were not put up for test identification parade at all. The finding of guilt recorded by the trial Court as against these two accused is on the premiss that they were party to criminal conspiracy to commit the alleged offence. Neither the P.W.1, P.W.4 and P.W.7 have given the description of these accused, to be engaged in the commission of the offence. That position is fairly accepted by the Public Prosecutor. The only reason as can be discerned from the trial Court's Judgment is noted in paragraph-19. It is stated that P.W.14 has spoken about the involvement of accused No.6 who is the brain child behind the offence of dacoity and robbery. Assuming that P.W.14

who is the Investigating Officer, has spoken about this fact, there is absolutely no material on record to support that position. No other witness has spoken about the involvement of accused Nos. 5 and 6 being party to the conspiracy to commit offence of dacoity. The only evidence that can be culled out against the accused No.5 is his identification by P.W.4 in court. As mentioned earlier, accused Nos. 5 and 6 were not put up for test identification parade. P.W.4 has identified the accused No.5 in court as one of the assailant, obviously under mistaken belief. For, in the cross-examination at the instance of accused Nos. 5 and 6, this witness has admitted that he was not in a position to state whether he had identified the accused No.5 at the test identification parade at Tahsil office. He has also admitted that he was not in a position to state whether the accused No.5 was paraded for identification parade. He is also not in a position to state whether he had given description and appearance of the accused No.5, when his statement was recorded. Suffice it to observe that the identification of accused No.5 in Court by P.W.4 will be of no avail to the prosecution and that cannot be the basis to proceed against the accused No.5. There is no other tittle of evidence to even remotely

connect the accused No.5 in the commission of the offence. The evidence of Investigating Officer cannot be the basis to proceed against the accused Nos.5 and 6, in absence of substantive evidence regarding their involvement. Prosecution is obliged to produce substantive evidence to establish the involvement of accused Nos. 5 and 6 for hatching criminal conspiracy to commit offence in question. There is no evidence at all in that behalf. There is no recovery of any incriminatory material or any incriminatory circumstance that can be pressed into service against the accused Nos.5 and 6. Besides, we have already noticed that the prosecution witnesses have positively stated that the persons involved in the commission of the offence were, at any rate, not exceeding four in number. If so, by no stretch of imagination provisions of Section 395 can be invoked.

10. In any case, to record finding of guilt against the persons having engaged in the offence punishable under section 395 of I.P.Code, it is necessary to establish his involvement and complicity at the time of offence. Suffice it to observe that there is no legal evidence worth the name to proceed against accused Nos. 5 and 6. The trial Court has not given any other good reason for recording finding

of guilt against the said accused except the observation in paragraph-14, which position is fairly accepted by Public Prosecutor. If this is so, accused Nos. 5 and 6 should necessarily succeed in their appeal being Criminal Appeal No.638 of 2004 and the finding of guilt recorded against them for the alleged offence will have to be set aside, as they deserve acquittal of the said charges.

11. Reverting back to the case against accused No.3. Out of the three incriminatory circumstances, so far as the first circumstance is concerned, we have already noticed that none of the prosecution witnesses P.W.1, P.W.4 or P.W.7 have specifically given the description of accused No.3 as involved in the commission of the offence. The description of the clothes worn by accused No.3 is spoken only by P.W.4. Description of the clothes given by him did not match the description of the clothes worn by the accused No.3, when he came to be accosted at the Kelva road police station on the same night under panchanama exh. 30. Indeed, accused No.3 has been identified by P.W.1 and P.W.7 as well as another eye witness Ramlal in the test identification parade. However, prosecution has not examined Ramlal. I will not enter into the controversy as to whether the

reason for not examining Ramlal is just and proper.

12. I shall first deal with the evidence of P.W.7. P.W.7, in his evidence claims that he had gone for identification of the accused persons to the Mamaledar office on the next day of incident. The incident took place on 7th September, 2001. That means according to him, he visited Mamaledar's office on 8th September, 2001. This is the categoric assertion made in his examination-in- chief. In the cross-examination, he has admitted that he had not gone to the police station or Mamaledar's office any time after 8th September, 2001. This evidence juxtaposed with the memorandum of Test Identification Parade Exh. 68 and the evidence P.W.13 Tahasildar, clearly creates doubt about the participation of P.W.7 in the test identification parade. Indeed, this witness has identified accused No.3 in court. However, that identification is almost after one and half years of the incident, which will be of no avail. That by itself cannot be the basis to proceed against the accused No.3. As mentioned earlier, none of the prosecution witnesses have spoken about the specific role of accused No.3 or gave description of accused No.3 to the police when their statements were immediately recorded.

13. There is yet other facet of the argument advanced on behalf of the accused No.3, which, in my opinion, requires to be accepted. According to the accused No.3, the Test Identification parade conducted by P.W.13 will have to be discarded as a whole. This is so because, P.W.13 who conducted the test identification parade, did not observe fundamental rules of not holding parade of more than two suspects at one time. According to the evidence of P.W.13, he had put all the four suspects accused Nos. 1 to 4 together for the test identification parade. They were made to stand amongst the twenty dummies. As per the provision in the High Court Criminal Manual, Rule 16(2)(i) and Rule 16(2)(v), it was not open to P.W.13 to put four suspects for identification parade together. The said rule read thus:

> "16(2)(i)Magistrate, if called upon for the purpose of holding an Identification Parade, should remember that he is the person who conducts the parade: he will be in full and sole charge of the entire proceedings."
>
> "16(2)(v) If there is only one accused person to be identified, there should be atleast half a dozen persons placed in the parade. If two accused persons are to be identified, then there should be about 10 or 12 persons in the parade. Not more than two accused should be placed in any single identification

> parade. Normally, the Police themselves will have called up the persons to be put in the parade; but the Executive Magistrate/-Honorary Magistrate should see that they are persons of more or less the same physical appearance, and approximately of the same age, as the person to be identified. It is desirable that innocent persons to be mixed should be different for each such parade."

14. There are other interesting features about the test identification parade. P.W.13 claims that he conducted the test identification parade in the chamber of his office. The description of the chamber is no where mentioned in the memorandum Exh. 68 or spoken by the P.W.13. From the evidence of P.W.13, it is obvious that more than 25 persons were huddled together in the chamber. In as much as, there were twenty dummies, 3 panchas, P.W.13 himself and four accused. Besides, the witness before whom all these persons were paraded was also present there. It is incomprehensible that group of 25 persons can be accommodated in the chamber, unless the chamber was so big that the entire exercise could have been carried out smoothly.

15. There is yet another aspect which is demonstrated from the evidence of P.W.13. In the examination in chief, P.W.13 stated that four suspects were identified by the witness P.W.7, P.W.4,

P.W.1 and Ramlal. P.W.7 identified Accused No.1 to 4, Ramlal identified Accused No.2. P.W.1 identified accused Nos. 1 to 4. However, from the memorandum of identification parade Exh.68, it is noticed that P.W.4 identified accused No. 2 and not accused No.4; whereas Ramlal identified accused No.3 and not accused No.2. In the cross-examination P.W.13 has admitted that before calling the dummies, police constable had not shown the suspects to him. In other words, he allowed the dummies to enter the room where the parade was conducted, without ascertaining whether the dummies had resemblance with the suspects. In the cross-examination P.W.13 has denied the suggestion that the dummies had no resemblance with the appearance of the suspects. That however, cannot improve the situation. The Officer who conducted the test identification parade is obliged to ensure before the suspects are paraded for identification that dummies should have similar resemblance with the suspects. Unless that was ascertained, P.W.13 could not have straightway called the dummies inside his chamber and suspects asked to follow them latter. Suffice it to observe that the identification parade conducted by P.W.13 was faulty in several respects and the evidence on record creates doubt about the correctness of the notings

made in the memorandum Exh.68. Moreover, we have already noticed that P.W.7 has admitted in his evidence that he did not attended Tahsil office for identification parade any time after 8th September, 2001, whereas the parade was conducted on 12th October, 2001 by P.W.13. This admission of P.W.7 belies the claim of P.W.13 as well as statement made in the memorandum Exh.68 that P.W.7 had attended the said identification parade of 12th October, 2001. It has created doubt about the correctness of the notings made in the Memorandum and the evidence given by P.W.13. Once the test identification parade conducted by P.W.13 was to be doubted, it would be unsafe to proceed against the accused No.3 on the basis of the dock identification. In as much as, the prosecution witnesses P.W.1, 4 and 7 have spoken that there was no light or electricity on the spot and that the incident in question took place almost 100 mtrs. away from the railway plat form. Accordingly, for want of visibility on the spot and the incident having lasted only for short period coupled with the fact that the dock identification is done almost-after 1 1/2 year, the same was of no avail. Significantly, neither P.W.1 nor P.W.4 or 7 have given specific description of accused No.3 or attributed any overtact to him about his

participation in the incident in question. Taking overall view of the matter, the accused No.3 would deserve benefit of doubt.

16. Indeed, the prosecution has relied on two other incriminatory circumstances against the accused No.3. However, even those incriminatory circumstances are of no avail. The first incriminatory circumstance is of recovery of cash from accused No.3 when he was accosted at Kelva Road railway station on the same night on the date of the incident under the memorandum Exh. 46. P.W.8 is stated to have acted as panch for drawing the said memorandum Exh. 46. The evidence of P.W.8 leaves no manner of doubt that the panchanama Exh.46 was prepared in advance. In the cross-examination, P.W.8 admits that he merely signed the same without understanding the contents thereof. This witness has admitted that he is familiar with the railway police station constables. This witness has not identified the accused. In the cross-examination, he admits that it is correct to say that the police had already recorded panchanama in the police station and that police asked his name and then obtained signature on the panchanama when he reached the police station. It is unsafe to rely on such evidence. The recovery

of article in the form of cash in the denomination of Rs.10/-and Rs.20 from accused No.3 therefore, will be of no avail. There is additional reason for which recovery of cash from accused No.3 will have to be discarded, as the currency notes recovered from the accused No.3 have not been identified as one contained in the bag taken away from P.W.4 by the assailants. Accordingly, even this incriminatory circumstance will be of no avail.

17. The last incriminatory circumstance against the accused No.3 is recovery of bloodstained clothes worn by him, when he was accosted from Kelva Road railway station below memorandum Exh. 30. Even this circumstance used against the accused No.3 will have to be discarded. The prosecution has relied on the evidence of P.W.2, who acted as panch for drawing memorandum Exh. 30. So far as this witness is concerned, he admits in the cross-examination that he had voluntarily gone to the police station on 7th September, 2001 at 10 p.m.. This witness has deposed that police showed him seized muddemal property in the police station. He admits that seizure panchanama was already recorded and police asked him to only sign on the seizure panchanama. He admits that he did not remember colour of seized clothes.

He had signed three different panchanama at one and the same time. This witness has been relied in relation to not only Exh. 30 but also Exh. 29 and 31 by the prosecution. Interestingly, Exh. 31 was not drawn on 7th September, 2001, but purportedly on 8th September, 2001. This witness admits that he was not called to the police station after 7th September, 2001. He admits that police had not seized any muddemal property in his presence. If this is the kind of evidence produced by the prosecution, it will be unsafe to rely on the recovery of clothes under Exh. 30 pressed into service by the prosecution. In any case, the incriminatory circumstances, on account of recovery of cash amount from accused No.3 and recovery of the blood stained clothes from accused No.3 cannot be the basis to proceed against the accused No.3, in absence of substantive evidence to indicate complicity of the accused No.3 in the commission of the offence. Accordingly, even the appeal preferred by the accused No.3 should succeed.

18. I am not burdening this Judgment with other aspects, which were argued by the counsel appearing for the parties, as both these appeals can be conveniently disposed of on the basis of reasons already recorded earlier.

19. Accordingly, both these appeals succeed. The impugned Judgment and order passed by the trial Court is set aside to the extent of recording of finding of guilt against the accused No. 3 as well as Accused Nos. 5 and 6. These three accused are acquitted of the charges levelled against them and are therefore, ordered to be set at liberty forthwith, unless required in connection with some other offence.